IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES CHAMBERLAIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Common Pleas Court of Richland County, Ohio, did not render a written opinion. The opinion of the Court of Appeals of Richland County, Ohio, Fifth District is unreported, (Appendix A of Petition). The Supreme Court of Ohio did not render a written opinion, but entered an entry overruling petitioner's motion for leave to appeal (Appendix B of Petition), entered an entry dismissing petitioner's appeal as of right (Appendix C of Petition), and entered an entry denying petitioner's motion for rehearing (Appendix D of Petition).

JURISDICTION

The purported jurisdictional requisites as set forth in the petition are not applicable, and there is no basis for jurisdiction in this court.

QUESTIONS PRESENTED

1. Is there a violation of petitioner's rights under the Fourteenth Amendment of the United States Constitution by the refusal of Ohio courts to grant petitioner's motion to reconsider a motion to withdraw a plea of guilty filed ten (10) months after the original order overruling the motion to withdraw the plea of guilty when evidence before the court indicated:

(a) Petitioner was accompanied by his employer to the police station at the time of arrest, and petitioner was advised of his right to counsel; of his right to remain silent; of the nature of the charge against him; and of the penalty provided by the statutes for such charge.

(b) Because of a calculated risk knowingly taken by petitioner and his counsel attempting to introduce error into the proceedings.

2. Is a plea of guilty entered by petitioner when accompanied by counsel and fully advised of the nature and cause of the offense with which he is charged subject to withdrawal without adequate cause?

3. Should this court reverse its position earlier adopted that secret observations by police officers of a public room do not constitute an illegal search and seizure under the Fourth Amendment of the United States Constitution as applicable to the State of Ohio under the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves identical factual situations in which this court has already found that there are no constitutional or statutory provisions involved.

STATEMENT

On August 24, 1962, petitioner, accompanied by his employer, entered the Mansfield Police Department at the request of the police and was taken into custody by a police lieutenant, who advised him of his right to counsel and of his right to remain silent. (R-109, 110) The lieutenant further advised petitioner that he was charged with sodomy and that the penalty for sodomy was one to twenty years, (R-138), and that under Ohio law there was no probation for sodomy. (R-112). Upon being advised of the charge and of his rights, petitioner gave a written statement to the police lieutenant and initialed the first paragraph of such statement that he had been advised of his right to counsel; that he did not have to make a statement, and that if he did, the same could be used against him; and that no promises had been made to him by the police officers. (R-104).

Petitioner immediately obtained counsel and requested that he be brought before the Common Pleas Court on a Bill of Information containing a charge of sodomy, and defendant, with counsel, on August 29, 1962, appeared in the Common Pleas Court of Richland County, and in writing waived irregularities in service, waived indictment by Grand Jury, and entered a plea of guilty. Pursuant to law, the court referred petitioner to Lima State Hospital for examination prior to sentence.

On September 4, 1962, petitioner, by counsel, filed a motion to strike the journal entry referring petitioner to

Lima State Hospital and also filed a motion to withdraw the plea of guilty, in which motion petitioner made no representations that he had not been advised of his rights or that he had been promised probation. On October 8, 1962, petitioner, represented by counsel, appeared for argument before the Court of Common Pleas, at which time both motions were considered by the court and overruled.

Petitioner then, by counsel, filed a Notice of Appeal in the Court of Appeals for Richland County, in which no specific assignment of error was made, but primarily arguing as error the overruling of the motion to strike the journal entry, and incidentally noting that the motion to withdraw the plea of guilty was overruled. While such appeal was pending, original counsel withdrew from the case and was replaced by present counsel, Lutz and Inscore, who raised the same questions as to the motion to strike the entry both by brief and by oral argument. Original counsel had formerly been an employee and assistant of present counsel, Theodore Lutz. (R-54). The Court of Appeals dismissed the Notice of Appeal for want of final order and certified its action to the Supreme Court of Ohio. The Certification of the questions involved to the Supreme Court of Ohio was then dismissed upon motion of present counsel for petitioner, and the matter remanded to the Common Pleas Court of Richland County, Ohio.

Upon remand to the Common Pleas Court, petitioner on July 3, 1963, then filed a motion for reconsideration of his motion to withdraw the plea of guilty and for the first time in the proceedings, made allegations that he had not been advised of his rights and that representations had been made that he might be considered for probation. On July 29, 1963, the Common Pleas Court had a complete hearing and took testimony on said motion to reconsider, at which

hearing it was adduced that petitioner had been fully advised of his rights by the police officers; that petitioner was a high school graduate and had had two semesters of college (R-82); that prior to entering the plea initially, petitioner's original counsel had read him the applicable sections of the Ohio code concerning the offenses in which cases probation was not permitted and Attorney General's opinion that there was no probation and discussed the calculated risk that might be taken to attempt to obtain probation (R-53). This hearing further adduced evidence that the first reference to probation made to petitioner was by his own counsel rather than police officers (R-97, 98); and that prior to entering the plea petitioner's counsel advised the State that the police officers had advised petitioner of the fact that there was no probation for sodomy before taking a statement from petitioner (R-125). Upon this evidence the Common Plaes Court overruled the motion for reconsideration.

The action of the Common Pleas Court in overruling the motion for reconsideration was assigned as error in the Court of Appeals of Richland County, Ohio. This assignment of error was overruled by the Court of Appeals and motion for leave to appeal permitted by the Supreme Court of Ohio. Upon consideration thereof, the Supreme Court of Ohio remanded the matter to the Common Pleas Court for want of a final order as defendant had not as yet been examined by Lima State Hospital in accordance with the original order of the Common Pleas Court.

Upon remand, petitioner was examined by Lima State Hospital and found not to be a psychopathic offender nor a mentally deficient offender, and on March 10, 1965, petitioner was finally brought before the Common Pleas Court of Richland County, Ohio, and was sentenced to not less

than one, nor more than twenty years in the Ohio State Penitentiary.

For the third time petitioner assigned error in the Court of Appeals of Richland County, Ohio, based upon the action of the Common Pleas Court in overruling petitioner's motion for reconsideration. The Court of Appeals found that there was no abuse of discretion on the part of the Common Pleas Court, and that all proceedings were in accordance with law. Petitioner then, for the third time, brought the matter before the Supreme Court of Ohio on motion for leave to appeal and appeal as of right, which motions were overruled on December 8, 1965. Petitioner's motion for rehearing in the Supreme Court of Ohio was dismissed on January 19, 1966.

ARGUMENT

All authorities presented by petitioner related to instances in which the accused has been denied the right to counsel or has been induced to enter a plea through misrepresentations of police officers. The State would fully concur that in such instances where there has not been a knowledgeable waiver of the accused's rights that such waiver should not be binding upon the accused.

The present situation, however, presents solely questions of fact as to whether or not any misrepresentations exist or as to whether or not the present petitioner was fully advised of his rights. The test has long been in Ohio that the trial court must consider and determine such questions, which action was taken by the trial court. The record affirmatively shows that defendant was advised by the police upon arrest of his right to counsel, that he need not make a statement, and that the same might be used against him if made; that there was no probation for the offense with

which he was charged, and of all the facts and evidence leading to his arrest. Petitioner immediately obtained counsel, who fully advised him of the law relating to the charge against petitioner. The method of procedure originated by petitioner's original counsel was pursued on appeal by present counsel, who now claims this action was erroneous. The sole question presented is thus one of fact and not one of law.

In attempting to raise an issue of law, rather than of fact, present counsel for petitioner attempt to raise a question of search and seizure. This question is identical with that question heretofore presented to this court in Case No. 223 in the Supreme Court of the United States, October term, 1963, on petition for a writ of certiorari to the Supreme Court of Ohio, being styled Ralph Arlee Poore, Newton Townsend, Edward Nixon, William Joseph Glass, petitioners, vs. James J. Mayer, Common Pleas Judge of Richland County, Ohio, State of Ohio, respondents, in which present counsel for petitioners was then counsel for petitioners, and in which present counsel for respondents was then counsel for respondents.

CONCLUSION

It is apparent that the sole question raised by petitioner is one of fact and that this question was not raised at the time of plea or of initial action by the Common Pleas Court, but was raised some ten (10) months later upon motion for reconsideration. That petitioner in three hearings before the Common Pleas Court, before the Court of Appeals of Richland County, Ohio, and before the Supreme Court of Ohio, has fully been accorded all constitutional rights and review of the factual questions, and that there is no issue of law presented for consideration by this court.

Respectfully submitted,

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